Supreme Court, U.S.
FILED

AUG 9 - 2010

OFFICE OF THE CLERK

No. 10-201

In The

Supreme Court of the United States

JOHN J. GRABNER, III,

Petitioner,

vs.

H AND R BLOCK ENTERPRISES, INC., DOES 1-10, H AND R BLOCK ENTERPRISES, INC., H AND R BLOCK EASTERN ENTERPRISES, INC., H AND R BLOCK, TAX AND BUSINESS SERVICES, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

ALLEN N. BRUNWASSER, ESQUIRE
P.O. Box 22212
Pittsburgh, PA 15222
(412) 391-0329

QUESTIONS PRESENTED FOR REVIEW

I. DOES 28 U.S.C. § 1954 VEST CLIENT WITH SAME PROTECTIONS GIVEN A CRIMINAL DEFENDANT AND/OR THE HOLDER OF A CIVIL CAUSE OF ACTION AND, IF IT DOES, CAN IT BE TAKEN AWAY BY A PROCEDURE WHOSE SCOPE IS APPLIED DIFFERENTLY BY DIFFERENT JUDGES SITTING IN THE SAME JUDICIAL DISTRICT?

II. DID THE DISTRICT COURT DEPRIVE CLIENT-PETITIONER OF HIS FUNDAMENTAL FIRST AMENDMENT RIGHT TO COURT ACCESS AND/OR HIS FIFTH AMENDMENT RIGHT TO DUE PROCESS AND HIS VESTED RIGHT TO 28 U.S.C. § 1654 COUNSEL BY HOLDING A PROTESTED BY HIM TELEPHONE CONFERENCE WHICH DID NOT PERMIT HIM TO PARTICIPATE IN VIOLATION OF F.R.C.P. 16(b)(1)(B) and (c)(1) AND WAS NOT AUTHORIZED BY A DISTRICT COURT RULE 7.1(b) AND (c) and A 85.5(o) WRITTEN REQUEST FOR IT AND WITHOUT A MANDATED 28 U.S.C. § 753(b) TRANSCRIPT REPORTER PRESENT AND WHICH PERMITTED ALL HIS COUNSEL INCLUDING PITTSBURGH COUNSEL WHO WAS NOT ADMITTED IN MISSOURI COURTS TO WITHDRAW WITHOUT PROVIDING FOR DISTRICT COURT RULE 83.5(o) REPLACEMENT COUNSEL AND NOT EXPLAINING WHY?

QUESTIONS PRESENTED FOR REVIEW – Continued

III. DID THE DISTRICT COURT COMPOUND THIS ERROR BY REFUSING A 28 U.S.C. § 1404(a) REQUESTED TRANSFER TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA WHERE IT ORIGINALLY HAD BEEN FILED AND WHERE PETITIONER HAD WILLING TO APPEAL COMPETENT COUNSEL?

IV. HAS THE DISTRICT COURT AND THE EIGHTH CIRCUIT COURT OF APPEALS PANEL SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, OR SANCTIONED SUCH A DEPARTURE BY A LOWER COURT, AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER? PETITIONER CONTENDS THE ANSWER SHOULD BE "YES".

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
OPINIONS BELOW	1
STATEMENT OF DISTRICT COURT JURISDICTION IN COURT OF FIRST INSTANCE	1
CONCISE STATEMENT OF THE BASIS FOR SUPREME COURT JURISDICTION	1
CONSTITUTIONAL, STATUTORY PROVISIONS AND RULES INVOLVED	2
CONCISE STATEMENT OF CASE	4
ARGUMENT IN SUPPORT OF PETITION TO GRANT CERTIORARI	16
I. DOES 28 U.S.C. § 1954 VEST CLIENT WITH SAME PROTECTIONS GIVEN A CRIMINAL DEFENDANT AND/OR THE HOLDER OF A CIVIL CAUSE OF ACTION AND, IF IT DOES, CAN IT BE TAKEN AWAY BY A PROCEDURE WHOSE SCOPE IS APPLIED DIFFERENTLY BY DIFFERENT JUDGES SITTING IN THE SAME JUDICIAL DISTRICT?	16

TABLE OF CONTENTS – Continued

Page

II. THE DISTRICT COURT DEPRIVED CLIENT OF HIS FUNDAMENTAL FIRST AMENDMENT RIGHT TO COURT ACCESS AND/OR HIS FIFTH AMENDMENT RIGHT TO DUE PROCESS AND HIS VESTED RIGHT TO 28 U.S.C. § 1654 COUNSEL BY HOLDING A PROTESTED BY HIM TELEPHONE CONFERENCE WHICH DID NOT PERMIT HIM TO PARTICIPATE IN VIOLATION OF F.R.C.P. 16(b)(1)(B) and (c)(1) AND WAS NOT AUTHORIZED BY DISTRICT COURT RULES 7.1(b) AND (c) and A 85.5(o) WRITTEN REQUEST FOR IT AND WITHOUT A MANDATED 28 U.S.C. § 753(b) TRANSCRIPT REPORTER PRESENT AND WHICH PERMITTED ALL HIS COUNSEL INCLUDING PITTSBURGH COUNSEL WHO WAS NOT ADMITTED IN MISSOURI COURTS TO WITHDRAW WITHOUT PROVIDING FOR DISTRICT COURT RULE 83.5(o) REPLACEMENT COUNSEL AND NOT EXPLAINING WHY 18

TABLE OF CONTENTS – Continued

Page

III. THE DISTRICT COURT COMPOUNDED THIS ERROR BY REFUSING A 28 U.S.C. § 1404(a) REQUESTED TRANSFER TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA WHERE IT ORIGINALLY HAD BEEN FILED AND WHERE PETITIONER HAD WILLING TO APPEAL COMPETENT COUNSEL? 18

IV. HAVE THE DISTRICT COURT AND THE EIGHTH CIRCUIT COURT OF APPEALS PANEL SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, OR SANCTIONED SUCH A DEPARTURE BY A LOWER COURT, AS TO CALL FOR AN EXERCISE OF TIIIS COURT'S SUPERVISORY POWER? PETITIONER CONTENDS THE ANSWER SHOULD BE "YES" 24

CONCLUSION AND REQUEST CERTIORARI BE GRANTED 29

APPENDIX

March 31, 2010 Judgment of Eighth Circuit Court of Appeals 1A

March 31, 2010 Opinion of Eighth Circuit Court of Appeals 3A

District Court, January 6, 2009 Judgment 7A

TABLE OF CONTENTS – Continued

Page

District Court January 6, 2009 Order 8A

District Court October 16, 2008 Order 19A

May 19, 2010 Order Denying Panel and En Banc Reargument 20A

H.R. 4008 Sections 1 and 3 ..... 21A

February 18, 2009 Problem Solving Suggestion 25A

December 28, 2008 Grabner Letter to Trial Court Yates-Grabner Retention Agreement..... 27A

Letter Explaining Grabner Obligations 29A

June 3, 2008 FACTA Amendment with Reasons Given For Its Enactment 33A

Grabner Letter to Yates..... 38A

TABLE OF AUTHORITIES

Page

CASES

American Federation Etc. v. Woodward, 1969, 406 F.2d 137 20

Ashcroft v. Iqbal, 129 S.Ct. 1937 (2009) 23

Bishop v. Committee of Professional Ethics Etc., 1982, C.A.8, 686 F.2d 1278 26

Brinkerhoff v. Hill, 1930, 281 U.S. 673, 50 S.Ct. 451 20

Brotherhood of Railroad Trainmen v. Virginia, 1964, 377 U.S. 1, 84 S.Ct. 1113.....19, 20

Brown v. Bathke, C.A.3, 1977, 566 F.2d 588.....22

Church of Scientology v. U.S., 1992, 506 U.S. 9, 113 S.Ct. 447 26

City of Pittsburgh v. The Honorable Paul A. Simmons, 1984, C.A.3 729 F.2d 953.....11

Cleaver v. Kemna, 2004, C.A.8, 122 Fed. App. 863 .....10, 22

Cupp v. Naughton, 1973, 414 U.S. 141, 94 S.Ct. 396 27

Dawson v. Marshall, 2009, C.A.9, 555 F.3d 798.....27

Day v. McDonald, 2006, ___ U.S. ___, 120 S.Ct. 1675 20

Gill v. Maclewski, 2008, C.A.8, 546 F.3d 557 26

Group Mexicana Etc. v. Alliances Bond Fund, Inc., 1999, 527 U.S. 318, 119 S.Ct. 1968 26

TABLE OF AUTHORITIES – Continued

Page

Grunin v. International House of Pancakes, 513 F.2d 114 27

Hall v. Coronodo, 1933, 412 U.S. 1, 93 S.Ct. 1943 26

Hinz v. Neuro Science, Inc., 2008, C.A.8, 538 F.3d 979 22

Hollingsworth v. Perry, 2010, ___ U.S. ___, 130 S.Ct. 705 29

Holloway v. Arkansas, 1978, 435 U.S. 475, 98 S.Ct. 1173 16

Holschen v. International, Etc., 2010, C.A.8, 598 F.3d 454 21

Hubbard v. U.S., 1995, ___ U.S. ___, 115 S.Ct. 1755 30

Huggins v. FedEx Ground Package System, Inc., 2007, C.A.8, 566 F.3d 771 23

In re Cendant Corp. Rides Litigation, 2001, C.A.3, 243 F.3d 722 27

In re Independent Counsel Kenneth Starr, 1998, C.A.8, 152 F.3d 741 ..... 28, 29

In re Murchison, 1955, 349 U.S. 133, 78 S.Ct. 623 21

In re Starr, 1998, C.A.8, 152 F.3d 741 28

International Woodsmen of America, 1977, C.A.8, 568 F.2d 64 26

Joint Anti-Fatalist Committee v. McGrath, 1951, 341 U.S. 123, 71 S.Ct. 624 20

TABLE OF AUTHORITIES – Continued

Page

Kyles v. Whitley, 1995, ___ U.S. ___, 115 S.Ct. 1576 30

L.A. Buy v. Bowes Leather Co., 1957, 352 U.S. 249, 77 S.Ct. 309 29

Logan v. Zimmerman Brush Co., 1982, 455 U.S. 422, 102 S.Ct. 1148 .....6, 17

McNabb v. U.S., 1943, 318 U.S. 32, 63 S.Ct. 606 30

Milone v. Exclusive Healthcare, 2001, C.A.8, 224 F.3d 615 28

Mitchum v. Foster, 1972, 407 U.S. 402, 92 S.Ct. 2162 20

National Farmer's Organization, Inc. v. the Honorable John W. Oliver, United States District Judge for the Eastern District of Missouri, 1976, C.A.8, 530 F.2d 815 .....11, 22

Noble v. Union River Lodging Co., 1893, 147 U.S. 165, 13 S.Ct. 271 23

Ohntrup v. Firearms Center, Inc., 1986, C.A.3, 802 F.2d 637 11

Owens v. Saverin, 2008, C.A.8, 293 Fed. App. at page 246.....19

Parents Involved in Community Schools v. Seattle School District, 2007, ___ U.S. ___, 127 S.Ct. 2738 26

Parton v. North, 1992, C.A.8, 571 F.2d 150 26

TABLE OF AUTHORITIES – Continued

Page

Peralta v. Heights Medical Center, Inc., 1988, ___ U.S. ___, 108 S.Ct. 846 20

Powell v. McCormack, 1969, 359 U.S. 486, 89 S.Ct. 1944 26

Reyes v. Johnson, 1992, C.A.8, 969 F.2d 700 19

Shay v. Flight C. Helicopter Service, Inc., 2003, ___ Pa.Super. ___, 822 A.2d 1.....23

Stoll v. Gottlieb, 1938, 305 U.S. 165, 59 S.Ct. 134 23

Tennessee Valley Authority v. Hill, 1978, 437 U.S. 153, 98 S.Ct. 2279 21

The Bank of Nova Scotia v. U.S., 1988, 487 U.S. 250, 108 S.Ct. 2269 27

The Valley Line Co. v. Ryan, 1985, C.A.8, 771 F.2d 366 22

Thomas v. Arn, 1985, 474 U.S. 140, 106 S.Ct. 466 27

United States, Petitioner v. Oakland Cannabis Buyers Cooperative, 2001, 532 U.S. 483, 121 S.Ct. 1711 26

United Transportation Union v. the State of Michigan, 1971, 401 U.S. 516, 91 S.Ct. 1076.....20

U.S.A. v. Blom, 2001, C.A.8, 242 F.3d 799.....28

Van Dusen v. Barrack, 1964, 376 U.S. 612, 84 S.Ct. 805 25

Washington v. Harper, 1990, ___ U.S ___, 110 S.Ct. 1028 20

TABLE OF AUTHORITIES – Continued

Page

Whitaker v. Wall, 1955, C.A.8, 226 F.2d 268.....26

Wilner v. Committee on Character and Fitness, 1963, 373 U.S. 96, 83 S.Ct. 1175 21

CONSTITUTIONAL PROVISIONS

First Amendment.....2, 17, 19, 20

Fifth Amendment 2, 17, 19, 20

STATUTES

15 U.S.C. § 1681(d).....7

15 U.S.C. §§ 1681n and o 4, 6, 25

15 U.S.C. § 1681P 1, 9

28 U.S.C. §§ 753(a) and (b).....2, 17, 18

28 U.S.C. §§ 753(a) and (c) 17

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1331 1

28 U.S.C. §§ 1391(b) and (c) 1

28 U.S.C. § 1654 .....2, 17, 18, 19, 20

28 U.S.C. § 1954 16

42 U.S.C. § 1983 19

TABLE OF AUTHORITIES – Continued

Page

RULES

F.R.C.P. 16(b)(1)(B) 18, 21, 22

Local Western District of Missouri Attorney Practice Rules

Local Rule 85.3(a) 3

Local Rule 83.5 3

Local Rule 85.3(1) 4

Local Rule 83.5(o) 4, 17, 18

OPINIONS BELOW

The District Court and Circuit opinions are unreported but have been reproduced in Appendix pages 8A, 15A (district court) and Appendix page 3A (circuit court).

STATEMENT OF DISTRICT COURT JURISDICTION IN COURT OF FIRST INSTANCE

The case originally filed in the Western District of Pennsylvania claimed jurisdiction under 28 U.S.C. § 1331 and 15 U.S.C. § 1681P and venue under 28 U.S.C. §§ 1391(b) and (c).

When the case was re-filed in the United States District Court for the Western District of Missouri, jurisdiction was asserted under 28 U.S.C. § 1331 and 15 U.S.C. § 1681P and venue under 28 U.S.C. §§ 1391(b) and (c).

CONCISE STATEMENT OF THE BASIS FOR SUPREME COURT JURISDICTION

(1) The Eighth Circuit panel decision denying relief was entered March 31, 2010. Rehearing by the panel and en banc was denied May 19, 2010.

(2) The date of the order to be reviewed is the final March 31, 2010 order, which will include all prior interlocutory orders.

(3) 28 U.S.C. § 1254(1) provides certiorari jurisdiction to the Supreme Court of the United States.

CONSTITUTIONAL, STATUTORY PROVISIONS AND RULES INVOLVED

First Amendment "Congress shall make no law respecting – the right of the people – to petition the government for a redress of "grievances."

Fifth Amendment "No person shall be – deprived of life, liberty or property, without due process of law, nor shall private property be taken for public use, without just compensation."

28 U.S.C. § 1654 "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively are permitted to manage and conduct causes therein."

28 U.S.C. § 753(a) and (b) "(a) Each district court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands shall appoint one or more court reporters." "(b) Each session of the court and every other proceedings designated by rule or order of the court or by one of

the judges shall be recorded verbatim by shorthand, mechanical means, electronic sound recording, or any other method, subject to regulations promulgated by the Judicial Conference and subject to the discretion and approval of the judge. The regulations promulgated pursuant to the preceding sentence shall prescribe the types of electronic sound recording or other means which may be used. Proceedings to be recorded under this section include (1) all proceedings in cases in open court; (2) all proceedings in other cases had in open court unless the parties with the approval of the judge shall agree specifically to the contrary; and (3) such other proceedings as a judge of the court may direct or as may be required by rule or order of court may be requested by any party to the proceeding."

Local Western District of Missouri Attorney Practice Rules

Local Rule 85.3(a)

"Role of Attorneys. The bar of this court shall consist of those attorneys-at-law (hereinafter called "attorney" or "counsel") heretofore admitted to practice before the court."

Local Rule 83.5

"Procedure for Admission. Each applicant for admission shall file with the clerk a written petition in form provided by the clerk – "

Local Rule 85.3(1)

"Any attorney residing outside this district and admitted to practice before and then in good standing in the United States District Court in the district of residence, upon written motion, be permitted by this court to appear and participate as an attorney in the trial of any action or the hearing of any motion, petition or other proceeding then pending before this court, – "

Local Rule 83.5(o)

"Withdrawal of Counsel and Entry of Appearance of New Counsel. Counsel may not be relieved from further representation of a client without obtaining leave of court. Such leave will ordinarily be denied unless entry of appearance by substitute counsel is assured or has occurred.

CONCISE STATEMENT OF CASE

1. On October 26, 1970, 15 U.S.C. § 1681n and o (the Fair and Accurate Credit Transactions Act, *FACTA)* became law. Its specific directions were:

a. § 1681n. Civil liability for willful noncompliance

(a) In general

Any person who willfully fails to comply with any requirement imposed under this subchapter with

respect to any consumer is liable to that consumer in an amount equal to the sum of –

(1)(A) any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1000; or

(B) in the case of liability of a natural person for obtaining a consumer report under false pretenses or knowingly without a permissible purpose, actual damages sustained by the consumer as a result of the failure or $1,000, whichever is greater;

(2) such amount of punitive damages as the court may allow; and

(3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by this court.

(b) Civil liability for knowing noncompliance

Any person who obtains a consumer report from a consumer reporting agency under false pretenses or knowingly without a permissible purpose shall be liable to the consumer reporting agency or $1,000, whichever is greater.

(c) Attorney's fees

Upon a finding by the court that unsuccessful pleading, motion or other paper filed in connection with an action under this section was filed in bad faith or purposes of harassment, the court shall award to the prevailing party attorney's fees

reasonable in relation to the work expended in responding to the pleading, motion, or other paper.

b. § 1681o Civil liability for negligent compliance

(a) In general

Any person who is negligent in failing to comply with any requirement imposed under this subsection with respect to any consumer is liable to that consumer in an amount equal to the sum of –

(1) any actual damages sustained by the consumer as a result of the failure; and

(2) in the case of any successful action to enforce any liability under this action, the costs of the action together with reasonable attorney's fees as determined by the court.

This section created a cause of action which is protected property. *Logan v. Zimmerman Brush Co.*, 1982, 455 U.S. 422, 428, 102 S.Ct. 1148, 1154.

2. On May 25, 2007, John J. Grabner, III (hereinafter called client), a lifetime resident of Beaver County, Pennsylvania, who was a disabled railroad train locomotive engineer with only a high school education, consulted Pittsburgh, Pennsylvania attorney, Alfred G. Yates, Jr., about a personal matter at which time that career class action specialist solicited him to become individual plaintiff and proposed class action representative to correct FACTA violations committed by H and R Block entities.

3. After client agreed, he and attorney Yates executed a May 25, 2007 agreement which is reproduced at Appendix, 29A.

4. Since I was convinced Attorney Yates actually was sincere in his desire to prevent national credit fraud, I agreed to be the actual and proposed class representative in a to be filed Pittsburgh lawsuit.

A. Pursuant to my cooperating, Attorney Yates prepared and I signed the enclosed employment agreement at which time Attorney Yates also gave me a letter listing my obligations (33A).

B. That "Information Letter" (page 1), inter alia, clearly informed me that I plus a class were to sue for unlawful printing of "more than the last five digits of the [credit] card numbers and/or the expiration date by H&R Block, Inc. (paragraph 1), that I "shall vigorously prosecute the litigation" (paragraph 2b), that my counsel are obligated by the court to adequately and fairly represent my case" (paragraph 2), that I "should know why you are suing" paragraph 2a(1)), that counsel are "vigorously pursuing this case" (paragraph 2b) and are experienced "national" experts in doing it with great success (paragraph 2c), counsel will advance the costs (paragraphs 3 and 2) and "have conducted a thorough investigation" to support "the allegations of the complaint" (paragraph 6) and that I have had no investigation obligation because they had done it (paragraph 6).

C. I believed what was written in the "Information Letter" and was so impressed by its

assurance that "all counsel actions are subject to judicial approval and courts take that approval seriously" (paragraph 9) and that "this should provide you comfort that our actions will be of the highest professional caliber" and that "settlement must be approved by the court" (paragraph e).

D. I DID NOT AGREE TO BE INDIVIDUAL AND CLASS REPRESENTATIVE FOR PERSONAL FINANCIAL GAIN AND, IN ADDITION, PARAGRAPH 5 WARNED ME "YOU HAVE NOT BEEN PROMISED ANY SPECIAL TREATMENT ABOVE THE TREATMENT WHICH MAY BE AWARDED TO OTHER CLASS MEMBERS". (See enclosed December 28, 2008 letter to Judge Smith (27A).

E. Although what later happened clearly disclosed by trusted lawyers only used me as a tool to seek windfall and enormous counsel fees and abandoned me and the class when that goal appeared unobtainable in full, I sincerely believed I would strike a blow for needed justice and actually protect both myself and the at least 5 million class members from credit card exposure.

F. PARAGRAPH 5 MADE ME A HERO "FOR HAVING COURAGE TO CHALLENGE DEFENDANT'S CONDUCT" BUT, AS DISCLOSED BELOW, A PARIAH WHEN MY "INFORMATION LETTER" LAWYERS SAW THEIR EASY BUCK EXPECTATIONS FADE. SEE ALSO DOCUMENT 99 FILED 12/20/08.

G. My suit in the United States District Court for the Western District of Pennsylvania at C.A. 07-718 was filed on May 25, 2007 but then discontinued and the same suit filed in the United States District Court for the Western District of Missouri at 07-599 where it was consolidated at 07-437 with the same type of claim suit filed there in Kansas City by Roxanna Wilson represented by one of my not Yates firm Pittsburgh counsel. The reason was "after conferring with defendant H&R Block in the interest of judicial economy and efficiency".

6. While the Kansas City case was being processed, FACTA was amended on June 3, 2008 by 15 U.S.C. § 1681(d) which directed:

"For the purposes of this section, any person who printed an expiration date on any receipt provided to a consumer cardholder at a point of sale or transaction between December 4, 2004, and June 3, 2008, but otherwise complied with the requirements of section 1681c(g) of this title for such receipt shall not be in willful noncompliance with section 1681c(g) of this title by reason of printing such expiration date on the receipt."

7. The reason for this "clarification" was set forth in *Westlaw* printout, Appendix, page 21A.

8. The record events relevant to this petition for certiorari are the following.

9. On August 11, 2008, Western District of Missouri Judge Ortrie D. Smith allowed my admitted

and unadmitted counsel to withdraw after conducting a telephone conference which:

A. Was held even though I requested it not take place and

B. Without granting my request to participate and

C. Without a required written motion to hold it and

D. Without a prior announced agenda on what was to be discussed and decided and

E. Without a mandated court reporter to record what was said and

F. Without providing for the usual substitute counsel to replace those departing and

G. Contrary to the procedure used by Western District of Missouri Judge Scott D. Wright, see January 23, 2007 telephone conference in another case by Judge Scott O. Wright where court reporter Shelly McDowell was present and recorded what was said (Document 105, page 4).

H. Chief Western District of Missouri Judge Whipplo refused to allow retained civil action counsel to withdraw unless a substitute took his place. (*Cleaver v. Kemna*, 2004, C.A.8, 122 Fed. App. 863, 864-865.)

I. United States Court of Appeals for the Third Circuit does not permit counsel to withdraw

without the same time substitution. *Ohntrup v. Firearms Center, Inc.*, 1986, C.A.3, 802 F.2d 637 and mandates in chambers proceedings be attending by a court reporter. *City of Pittsburgh v. The Honorable Paul A. Simmons*, 1984, C.A.3 729 F.2d 953, 955 approving *National Farmer's Organization Inc. v. The Honorable John W. Oliver*, U.S. Judge for the Western District of Missouri, 1976, C.A.8, 530 F.2d 815, 816 (failure to record can't be saved by counsel or court recollection.)

10. On January 6, 2009, Judge Smith granted summary judgment against me because the June 3, 2009 *FACTA* amendment eliminated my claims even though other claims remained undecided because they were moot but did not identify them. (7A, 9A)

11. After post decision motions were denied, client filed a timely appeal in the Eighth Circuit Court of Appeals.

12. On April 15, 2009, client filed a motion for exercise of the appeal court's supervisory power but this over 8-1/2 pound package, receipted for by a named clerk disappeared with no explanation of how this could happen.

13. However, client filed additional requests, including bringing the problem to the personal attention of the Chief Judge but the motion was eventually denied.

14. On or about August 4, 2009, client filed a timely brief and appendix to which the Block counsel responded on September 2, 2009.

15. The briefs were submitted to a panel of the Eighth Circuit on March 5, 2010 the panel affirmed on March 31, 2010 and filed an opinion Appendix 5A.

16. Panel and en banc reargument was denied May 19, 2010 Appendix 20A.

17. Although client requested his counsel and the court to tell him what was said in the telephone conference and why his counsel was allowed to withdraw, the request was ignored and zero disclosed.

A. The circuit panel (last 3 lines of opinion, page 2 - line 1 page 3) affirmed by advising "decision to allow counsel to withdraw is left to court discretion" even though there were no facts on which to exercise discretion and

B. Advised (page 3, lines 1-3) "pro se litigant has no statutory or constitutional right to have counsel appointed in civil case" even though client's complaint was not a request to appoint counsel but an objection to improperly removing counsel followed by failure to direct withdrawing counsel provide a substitute.

THE JUNE 3, 2009 FACTA AMENDMENT DID NOT MOOT OTHER COMPLAINT ISSUES

18. Although client's complaint repeatedly alleged both credit card digital and expiration date violations (paragraphs 1, 4, 5, 7, 19, 25, 27, 29, 31, 32, 33 Note 1, page 8, 37, 38b, d, f, 45, 46, 47, 48, 49, 50, 51, 52, 53)

A. District Judge Smith concluded client did not (document 103, page 4, line 7-8 ("Grabner's claims arise from defendants' failure to truncate the expiration date and not the failure to truncate his credit card number")).

B. The circuit panel opinion (page 2, lines 5-6) does not clearly resolve this problem since its finding "Grabner also alleged that defendants printed more than the last five digits of the expiration date" could be a typo error stating "expiration date" but meaning "credit card" especially when the "expiration date is discussed in lines 1-3".

19. However, (lines 1-2) does find "Grabner brought a claim for damages and equitable relief" which supports his claim he did so.

A. In both client suits in Pittsburgh and Kansas City the claim for relief requests:

> "F. Awarding appropriate equitable relief to ensure that the company's unlawful conduct does not continue and
>
> G. Granting plaintiffs and the class such other further and different relief as the nature of the case may require

or as may be determined to be just, equitable and proper by this court".

B. In his depositions, client clearly stated his lawsuit purpose –

(1) Document 38, page 19 – "and I want to ensure that H and R Block never does this again to anybody" and

(2) Lines 23-25, page 65 "I want H and R Block to stop printing receipts with the expiration dates" and

(3) Page 47 complained – H and R Block "unlawfully printed with more than the last five digits of the card number and/or the expiration date".

C. Ignoring the clear still pending equitable claim, district Judge Smith concluded only expiration dates were involved and the appeal panel found no abuse of discretion (page 2, second paragraph).

20. On December 28, 2008 (document 105), I explained to Judge Smith why I persisted in pursuit of this case (Appendix 27A).

21. In document 107, page 8, client protested district Judge Smith's failure to rule on numerous issues.

A. The document 92 issue was denied in document 107, 103.

B. The panel opinion ignored that problem.

22. During litigation, it was discovered that one of Roxanna Wilson counsel was disqualified because co-plaintiff Roxanna Wilson was both his employee and involved in a personal relationship with him (see document 86, page 2).

A. On August 6, 2008, document 81, a stipulation was court approved to dismiss her case "with prejudice".

B. No reason was stated to support the dismissal.

C. Thus, the only reason client withdrew his Western District of Pennsylvania suit and re-filed it in Kansas City was gone especially when

D. All other former lawyers have been allowed to withdraw leaving their client lawyerless against his will (document 82).

23. Client asked his counsel not to request or participate in the telephone conference, to present a written motion or request if they did and to tell Judge Smith he objects to it and wants to participate if it is held.

A. One of the written letters are reproduced in the Appendix (33A) and

B. Judge Smith does not deny client made these requests.

24. Client made reasonable efforts to obtain substitute counsel to process the Kansas City case.

A. He did not succeed but

B. Did obtain competent counsel willing to participate if the case was sent back to the Western District of Pennsylvania where it had been originally filed (see reproduced "Problem Solving Suggestion" (25A).

ARGUMENT IN SUPPORT OF PETITION TO GRANT CERTIORARI

I. DOES 28 U.S.C. § 1954 VEST CLIENT WITH SAME PROTECTIONS GIVEN A CRIMINAL DEFENDANT AND/OR THE HOLDER OF A CIVIL CAUSE OF ACTION AND, IF IT DOES, CAN IT BE TAKEN AWAY BY A PROCEDURE WHOSE SCOPE IS APPLIED DIFFERENTLY BY DIFFERENT JUDGES SITTING IN THE SAME JUDICIAL DISTRICT?

1. 28 U.S.C. § 1954 directs that "in all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively are permitted to manage and conduct causes therein".

2. I respectfully contend that mandatory statute clearly eliminating any and all argument that I do not have the identical protections given a criminal defendant in representative opinions like *Holloway v. Arkansas*, 1978, 435 U.S. 475, 488, 98 S.Ct. 1173, 1181 ("moreover, this court has concluded that the

assistance of counsel is among those" "constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error") and

3. That this vested right is no less important than the vested right to a civil cause of action which cannot be taken away without Fifth Amendment due process, *Logan v. Zimmerman Brush Co.*, 1982, 455 U.S. 422, 428 and Note 4, 102 S.Ct. 1148, 1154 and Note 4.

4. The due process should not be withheld by one judge but granted by another judge of the same judicial district, 455 U.S. at 428, 102 S.Ct. at 1154.

5. Judge Smith supplies no court reporter or counsel substitution but Judge Wright and Chief Judge Whipple and the U.S. Court for the Third Circuit supplied it.

6. Thus, if my case had been assigned to Judge Wright or Judge Whipple or processed in the Third Circuit, I would have received the 28 U.S.C. §§ 1654, 753(a) and (c), Local Rule 83.5(o), First and Fifth Amendment protections which Judge Smith denied me and my litigation fate determined by the "luck of the draw" condemned in *Logan*.

7. I respectfully contend that if this argument is rejected that Questions II, III and IV still justify grant of certiorari.

II. THE DISTRICT COURT DEPRIVED CLIENT OF HIS FUNDAMENTAL FIRST AMENDMENT RIGHT TO COURT ACCESS AND/OR HIS FIFTH AMENDMENT RIGHT TO DUE PROCESS AND HIS VESTED RIGHT TO 28 U.S.C. § 1654 COUNSEL BY HOLDING A PROTESTED BY HIM TELEPHONE CONFERENCE WHICH DID NOT PERMIT HIM TO PARTICIPATE IN VIOLATION OF F.R.C.P. 16(b)(1)(B) and (c)(1) AND WAS NOT AUTHORIZED BY DISTRICT COURT RULES 7.1(b) AND (c) and A 85.5(o) WRITTEN REQUEST FOR IT AND WITHOUT A MANDATED 28 U.S.C. § 753(b) TRANSCRIPT REPORTER PRESENT AND WHICH PERMITTED ALL HIS COUNSEL INCLUDING PITTSBURGH COUNSEL WHO WAS NOT ADMITTED IN MISSOURI COURTS TO WITHDRAW WITHOUT PROVIDING FOR DISTRICT COURT RULE 83.5(o) REPLACEMENT COUNSEL AND NOT EXPLAINING WHY.

III. THE DISTRICT COURT COMPOUNDED THIS ERROR BY REFUSING A 28 U.S.C. § 1404(a) REQUESTED TRANSFER TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA WHERE IT ORIGINALLY HAD BEEN FILED AND WHERE PETITIONER HAD WILLING TO APPEAL COMPETENT COUNSEL.

A. By not explaining why it allowed counsel to withdraw and not requiring a substitute to replace

them, the district court and the circuit panel overruled the mandates of 8th circuit law published in *Reyes v. Johnson,* 1992, C.A.8, 969 F.2d 700, 704-705 which has been cited with approval 45 times which includes 14 times by the 8th circuit, 19 times by its district courts and 5 times by the Western District of Missouri and as recently as 2008 in *Owens v. Saverin*, 2008, C.A.8, 293 Fed. App. at page 24€. *Reyes* granted a new trial and remanded for appointment of substitute counsel to replace the one who withdrew in a 42 U.S.C. § 1983 action because the district court did not explain why it did not order substitution.

B. Here, the district court and the appeals panel mistakenly faulted client for asking the court to appoint counsel when the record clearly disclosed he had supplied retained counsel before the objected to withdrawal.

1. 28 U.S.C. § 1654 provides him with the absolute right to "plead and conduct" his case "by counsel".

2. By taking this mandated right away, the district court and the appeal panel deprived him of first amendment court access and Fifth Amendment due process.

3. He cited and still relies on the protection of *Brotherhood of Railroad Trainmen v. Virginia*, 1964, 377 U.S. 1, 7, 84 S.Ct. 1113, 1117, which advises that the first and Fourteenth Amendment right to petition the court includes the right to counsel because "laymen cannot be expected to know how to

protect their rights when dealing with practiced and carefully counseled adversaries" (here enormous corporations represented by 1200 member international law firm and

4. *United Transportation Union v. the State of Michigan*, 1971, 401 U.S. 516, 585, 91 S.Ct. 1076, 1087 which followed the teachings of *Brotherhood* and advised "meaningful access to the courts is a fundamental right within the protection of the first amendment" which "hollow" if the right to choose counsel is denied.

5. The Eighth Circuit Court of Appeals has approved both *Brotherhood* and *Trainmen* in *American Federation Etc. v. Woodward*, 1969, 406 F.2d 137, 139, N.5.

C. The client protested proceeding also deprived client of his 28 U.S.C. § 1654 first and fifth amendment protections as defined in cases like *Day v. McDonald*, 2006, ___ U.S. ___, 120 S.Ct. 1675, 1684 (opportunity to defend); *Washington v. Harper*, 1990, ___ U.S. ___, 110 S.Ct. 1028, 1044 (decision made without hearing violates due process); *Peralta v. Heights Medical Center, Inc.*, 1988, ___ U.S. ___, 108 S.Ct. 846 (even if result after due process would be the same) and

Joint Anti-Fatalist Committee v. McGrath, 1951, 341 U.S. 123, 178, 71 S.Ct. 624, 652; *Mitchum v. Foster*, 1972, 407 U.S. 402, 92 S.Ct. 2162 (court cannot violate due process); *Brinkerhoff v. Hill*, 1930, 281 U.S. 673, 682, 50 S.Ct. 451, 454 (accord) and

Wilner v. Committee on Character and Fitness, 1963, 373 U.S. 96, 105, 83 S.Ct. 1175, 1181 (lack of witness confrontation); *In re Murchison*, 1955, 349 U.S. 133, 138, 78 S.Ct. 623, 625 (Judge cannot be witness in case he decided because he cannot be cross-examined); *Tennessee Valley Authority v. Hill*, 1978, 437 U.S. 153, 194-195, 98 S.Ct. 2279, 2302 (use of special procedures to obtain desired result condemned).

As recently as March 12, 2010, the Eighth Circuit Court of Appeals has affirmed the right to this due process. *Holschen v. International, Etc.*, 2010, C.A.8, 598 F.3d 454, 464, Note 4.

D. Even if the above mandates were not presented, the only provision for a "telephone" conference is mandatory F.R.C.P. 16(b)(1)(B) which directs "after consulting with the parties' attorneys and other unrepresented parties at a scheduling conference or by telephone, mail, or other means" the court is given almost unlimited problem resolving authority over "Other appropriate matters (3)(vi) which result in" (p) facilitating in other ways the just, speedy, and inexpensive disposition of the action".

1. Client respectfully contends that he was an unrepresented party at the August 11, 2008 at 2 p.m. telephone conference and thus had an absolute F.R.C.P. 16 right to participate and resist counsel withdrawal and whatever was decided there.

2. He also contends he exercised sufficient diligence in attempting to prevent the telephone conference and, if it took place, participate in it.

3. *Hinz v. Neuro Science, Inc.*, 2008, C.A.8, 538 F.3d 979, 983; *The Valley Line Co. v. Ryan*, 1985, C.A.8, 771 F.2d 366, 374 and *Brown v. Bathke*, C.A.3, 1977, 566 F.2d 588, 592 protect his 8th circuit litigation due process rights and *National Farmer's Organization, Inc. v. the Honorable John W. Oliver, United States District Judge for the Eastern District of Missouri*, 1976, C.A.8, 530 F.2d 815, 816 mandate the proceedings be recorded and *Cleaver v. Kemna*, 2004, C.A.8, 122 Fed. App. 863, 865, advised that failure to provide substitute counsel will be reversed.

4. Judge Smith in his order allowing withdrawal (document 82) and his opinion (document 87, page 2, lines 6-7, 20, page 3) does not address this problem (Grabner told he can sue his withdrawing counsel but Judge Smith lacks authority to do it (lines 19-20)) and the appeal panel opinion (3A, page 3, lines 9-11) sub silento overrules the, *Judge Oliver* panel and the specific mandates of Rule 16 by concluding "Grabner did not have a right under Federal Rules of Civil Procedure 16(b)(1)(B) or (c)(1) to be present for the conference call".

5. I respectfully suggest the appeals panel should not be permitted to overrule published Supreme Court and previous panel decisions or refuse to follow a Supreme Court Rule of Civil Procedure.

24. Since the case record clearly discloses that Pittsburgh lawyers Alfred G. Yates and Gerald L. Rutledge never requested their entry of appearance in Missouri courts and were never admitted in Kansas City, Judge Smith and the appeals panel had no jurisdiction to allow them to participate in the telephone conference or permit them to withdraw as Grabner counsel in violation of the May 25, 2007 retention agreement with its arbitration for dispute provisions (31A) and 28 U.S.C. § 1654.

A. *Noble v. Union River Lodging Co.*, 1893, 147 U.S. 165, 173, 13 S.Ct. 271, 273 and *Stoll v. Gottlieb*, 1938, 305 U.S. 165, 176, 59 S.Ct. 134, 139-140 which follows it, advise lack of service to obtain jurisdiction of a party makes any decision involving that party a "nullity" and "void".

B. Pennsylvania law which the May 25, 2007 retention agreement orders to be applied is the same. *Shay v. Flight C. Helicopter Service, Inc.*, 2003, ___ Pa.Super. ___, 822 A.2d 1, 2, especially where due process notice and opportunity to defend is involved (822 A.2d at 16).

C. The Eighth Circuit applies this rule even when a non-party participates in the case defense and obligates the court to note lack of jurisdiction sua sponte. *Huggins v. FedEx Ground Package System, Inc.*, 2007, C.A.8, 566 F.3d 771, 773.

D. The Supreme Court on May 18, 2009 in *Ashcroft v. Iobal*, 129 S.Ct. 1937, 1945 advised "subject matter jurisdiction cannot be forfeited or

waived and should be considered when fairly in doubt".

E. Neither Judge Smith nor the appeals panel responded to this problem which violated my May 25, 2009 contract rights and I respectfully request the Supreme Court do it for them.

IV. HAVE THE DISTRICT COURT AND THE EIGHTH CIRCUIT COURT OF APPEALS PANEL SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, OR SANCTIONED SUCH A DEPARTURE BY A LOWER COURT, AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER? PETITIONER CONTENDS THE ANSWER SHOULD BE "YES".

25. On February 18, 2009, client filed document 115-2 which requested his case be transferred to the United States District Court for the Western District of Pennsylvania where it had originally been filed and where he has secured counsel.

A. I respectfully contend that since all my Kansas City case lawyers are gone and since Kansas City plaintiff Wilson is disqualified because she worked for and was personally involved with a case lawyer and has also stipulated her case be dismissed with prejudice that there was and is no reason to force me, resident of Beaver County, Pennsylvania, who knows no and has been unable to obtain

Missouri lawyers to continue to litigate in Kansas City, pro se, when I am able to proceed with lawyer representation in Pittsburgh.

B. The appeals panel (page 3, last paragraph) did not notice or discuss these facts or any facts to support its no transfer decision that there was no abuse of district court discretion.

C. On March 3, 2009 (document 117, page 1, paragraph 4), I offered to withdraw my appeal if Judge Smith transferred my case to Pittsburgh. The request was denied (document 12).

D. I respectfully contend refusal to transfer is at war with cases like *Van Dusen v. Barrack*, 1964, 376 U.S. 612, 644, 84 S.Ct. 805, 823 and the refusal should be reversed and the case transferred to the United States District Court for the Western District of Pennsylvania where it can receive a fresh look presented by willing counsel.

E. I respectfully contend the record in this case supports a finding that my Pittsburgh lawyers improperly recruited me as a protection against consumer fraud plaintiff when their secret motive was to generate a "fast buck" with little effort by enforcing the automatic damage provision of 15 U.S.C. § 1681n and o but

F. When the flood of opportunistic lawyers caused these provisions to be revoked on June 3, 2008 leaving only hard work less windfall goldmine lawyer benefits, my lawyers decided to bailout (see reasons

for June 3, 2008 amendment) in direct rejection of my contrary instructions.

G. The June 3, 2008 amendments left intact unmooted my request for equitable relief to ensure that H and R Block defendants would not violate the credit card digit truncation and expiration date prohibitions but removed the windfall no harm provisions. *Powell v. McCormack*, 1969, 359 U.S. 486, 497, 89 S.Ct. 1944, 1951; *Church of Scientology v. U.S.*, 1992, 506 U.S. 9, 13, 113 S.Ct. 447, 450; *Parents Involved in Community Schools v. Seattle School District*, 2007, ___ U.S. ___, 127 S.Ct. 2738, 2754 and Eight Circuit decisions like

H. *Gill v. Maclewski*, 2008, C.A.8, 546 F.3d 557, 565; *Bishop v. Committee of Professional Ethics Etc.*, 1982, C.A.8, 686 F.2d 1278, 1289; *Whitaker v. Wall*, 1955, C.A.8, 226 F.2d 268, 272; *International Woodsmen of America*, 1977, C.A.8, 568 F.2d 64, 66 and *Parton v. North*, 1992, C.A.8, 571 F.2d 150, 154.

I. Federal courts have equity power which includes authority to award it counsel fees to equalize unequal resources. *Hall v. Coronodo*, 1933, 412 U.S. 1, 4-5, 13 and Note 6, 93 S.Ct. 1943, 1945-1946, and Note 6, 1950; *Group Mexicana Etc. v. Alliances Bond Fund, Inc.*, 1999, 527 U.S. at 318, 119 S.Ct. at 1968; *United States, Petitioner v. Oakland Cannabis Buyers Cooperative*, 2001, 532 U.S. 483, 495, 121 S.Ct. 1711, 1720.

J. The United States Supreme Court has supervisory power to control conduct by district and courts of appeals.

1. I rely on published opinions like *Thomas v. Arn*, 1985, 474 U.S. 140, 154, 106 S.Ct. 466, 474-475 (court of appeals has supervisory power over subordinate judicial officers) relied upon as recently as *Dawson v. Marshall*, 2009, C.A.9, 555 F.3d 798, 801 (even though no law broken or right denied statute resisted or constitutional protection denied; power at "apex" when court personnel involved) and

2. *Cupp v. Naughton*, 1973, 414 U.S. 141, 146, 94 S.Ct. 396, 400 (appeal court has "supervisory power" to reverse judgments of such courts which the appellate court concludes were wrong and "likewise require it to follow procedures deemed desirable from the viewpoint of sound judicial practice although in no way commanded by statute or by the constitution" but precept applied there) and

3. *In re Cendant Corp. Rides Litigation*, 2001, C.A.3, 243 F.3d 722, 729, citing *Grunin v. International House of Pancakes*, 513 F.2d 114, 127, N.13, C.A.8 – (appeal court has supervisory authority whose "judicial scrutiny reaches to all corners of the class action process" including selection of class counsel, their fiduciary obligation to the class and fees).

4. *The Bank of Nova Scotia v. U.S.*, 1988, 487 U.S. 250, 254, 108 S.Ct. 2269, 2373 (rule of procedure is "binding as any statute" and causes "all

laws in conflict therewith shall be of no further force and effect"; court's supervisory power, which can formulate procedures not specifically required by the constitution or the Congress cannot overrule or conflict with F.R.Crim.P. 52(a), which prohibits remedy when there is "harmless error").

5. *In re Starr*, 1998, C.A.8, 152, F.3d 741, 750 (supervisory authority extended to civil cases where "judicial activities of the district courts" are at issue).

6. *Milone v. Exclusive Healthcare*, 2001, C.A.8, 224 F.3d 615, 622 (Eighth Circuit Court of Appeals "exercises its supervisory powers to ensure that contingency fee contracts are fair and reasonable").

7. *In re Independent Counsel Kenneth Starr*, 1998, C.A.8, 152 F.3d 741, 750 (court of appeals has "supervisory powers over lower courts" which "has been extended on occasion to monitor the adjudication of civil and quasi-criminal matters" but will not exercise it to adjudicate the conflict of interest private complaints against independent counsel prosecutor because informant has no standing to file on appeal denial just because he is an informant).

8. *U.S.A. v. Blom*, 2001, C.A.8, 242 F.3d 799, 803 ("we have supervisory power to order a new trial in federal cases for reasons that do not amount to a due process violation" – here change of venue due to publicity in murder case – but denied, 95 S.Ct. 2031, 421 U.S. 794, 804 (C.J. Burger) cited

9. *L.A. Buy v. Bowes Leather Co.*, 1957, 352 U.S. 249, 259, 77 S.Ct. 309, 315 (court of appeals have supervisory control of the district courts to assure "proper judicial administration" – here to issue mandamus to prevent assigning civil cases for decision by a master – cited in *Starr*, 152 F.3d at 750).

CONCLUSION AND REQUEST CERTIORARI BE GRANTED

I respectfully contend and strongly urge the United States Supreme Court to reverse the district and appeals courts in this case, reinstate the withdrawn lawyers and direct them to properly process this case and, by doing so, advise the public and the national bar that the practice of law is still a noble profession – not a fast buck easy to function business.

By doing so, this court will also advise that it intends to enforce *Hollingsworth v. Perry*, 2010, ___ U.S. ___, 130 S.Ct. 705, 706 ("court's enforce the requirement of procedural regularity on others and must follow those requirements from themselves" and that the other 8 justices endorse what the Chief Justice said on April 4, 2009 at the University of Arizona at Tucson (carried by C-Span) warning that the only way for federal, not subject to election, judges can retain public respect is by publishing opinions explaining the rationale for their decisions and

Client respectfully contends that granting this petition will serve as clear notice to all subordinate state and federal judicial officers that serious failure to maintain mandated judicial decision making standards will not escape vigilant supervision and correction by this nation's highest court because of time and resource limitations and further reliance on authority like *Hubbard v. U.S.*, 1995, ___ U.S. ___, 115 S.Ct. 1755, 1765 and Note 3 (three justices discuss inability of U.S. Supreme Court to monitor subordinate courts encouraged them to do what they want; *Kyles v. Whitley*, 1995, ___ U.S. ___, 115 S.Ct. 1576, 1577 (6 justices) and "the history of liberty has largely been the history of procedural standards" *McNabb v. U.S.*, 1943, 318 U.S. 32, 347, 63 S.Ct. 606, 616.

Respectfully submitted:

ALLEN N. BRUNWASSER, ESQUIRE
P.O. Box 22212
Pittsburgh, PA 15222
(412) 391-0329

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 09-1524

Roxana Wilson,

Plaintiff

John J. Grabner, III,

Plaintiff-Appellant

Wilson, Roxanna & Grabner, John J., III,

Plaintiff

v.

H&R Block Enterprises, Inc.; Does 1-10; H&R Block Enterprises, Inc.; H&R Block Eastern Enterprises, Inc.; H&R Block Tax and Business Services, Inc.,

Defendants-Appellees

Appeal from U.S. District Court for the
Western District of Missouri – Kansas City
(4:07-cv-00437-ODS)

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in

this cause is affirmed in accordance with the opinion of this Court.

March 31, 2010

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 09-1524

Roxana Wilson, Plaintiff, John J. Grabner, III, Appellant, Wilson, Roxanna & Grabner, John J., III, Plaintiff, v. H&R Block Enterprises, Inc.; Does 1-10; H&R Block Enterprises, Inc.; H&R Block Eastern Enterprises, Inc.; H&R Block Tax and Business Services, Inc., Appellees.	*	Appeal from the United States District Court for the Western District of Missouri. [UNPUBLISHED]

Submitted: March 5, 2010
Filed: March 31, 2010

Before WOLLMAN, COLLOTON, and GRUENDER, Circuit Judges.

PER CURIAM.

John Grabner brought a claim for damages and equitable relief, alleging that he received from H&R Block Eastern Enterprises, Inc., an electronically printed receipt that displayed the expiration date of his credit card, in violation of the Fair and Accurate Credit Transactions Act (FACTA), which is codified in 15 U.S.C. § 1681. Grabner also alleged that defendants printed more than the last five digits or the expiration date on the credit "and/or" debit card receipts of purported class members, and he moved to certify the class. The district court[1] granted summary judgment for defendants, and denied the motion to certify the class. Grabner appeals.

After careful de novo review, viewing the evidence and all fair inferences from it in the light most favorable to Grabner, *see Johnson v. Blaukat*, 453 F.3d 1108, 1112 (8th Cir. 2006), we conclude that summary judgment was proper for the reasons stated by the district court, and that because Grabner had no cause of action under FACTA, the district court did not err in not allowing him to represent the class, *see E. Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977) (class representative must be part of class and possess same interest and suffer same injury as class members). We also conclude that the court did not abuse its discretion in denying

---

[1] The Honorable Ortrie D. Smith, United States District Judge for the Western District of Missouri.

Grabner's motion for relief from judgment. *See* Fed. R. Civ. P. 60(b)(1)-(6) (grounds for relief from final judgment); *Murphy v. Mo. Dep't of Corr.*, 506 F.3d 1111, 1117 (8th Cir. 2007) (standard of review for Rule 60(b) motion); *United States v. Metro. St. Louis Sewer Dist.*, 440 F.3d 930, 933 (8th Cir. 2006) (standard of review for Rule 59(e) motion; motion serves limited function of correcting manifest errors of law or fact or considering newly discovered evidence).

Further, we conclude that the district court did not err in allowing Grabner's attorneys to withdraw, *see Fleming v. Harris*, 39 F.3d 905, 908 (8th Cir. 1994) (decision to allow counsel to withdraw is left to court's discretion); *see also* W.D. Mo. R. 83.5(o) (local rule regarding withdrawal of counsel); *Stevens v. Redwing*, 146 F.3d 538, 546 (8th Cir. 1998) (pro se litigant has no statutory or constitutional right to have counsel appointed in civil case); that the court was not required to record an August 2008 conference call with Grabner's attorneys, *see* 28 U.S.C. § 753(b) (each session of court and every other proceeding designated by rule or order of court or by one of judges shall be recorded; describing proceedings to be recorded); *In re Beard*, 811 F.2d 818, 833-34 (4th Cir. 1987) (§ 753(b) did not require presence of court reporter at conference call among lawyers and judge, as such call is not significantly different than proceedings in chambers); and that, contrary to his argument, Grabner did not have a right under Federal Rule of Civil Procedure 16(b)(1)(B) or (c)(1) to be present for the conference call.

Finally, we conclude that the district court did not abuse its discretion in denying Grabner's motion to transfer the case to the Western District of Pennsylvania. *See* 28 U.S.C. § 1404(a) (for convenience of parties and witnesses, in interest of justice, district court may transfer any civil action to any other district or division where it might have been brought); *Hubbard v. White,* 755 F.2d 692, 694-95 (8th Cir. 1985) (grant or denial of change of venue under § 1404(a) is in discretion of trial court and may not be set aside absent clear showing of abuse of discretion).

Accordingly, we affirm.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

JOHN J. GRABNER, III, et al., Plaintiff, vs. H & R BLOCK, INC., et al., Defendant.	JUDGMENT IN A CIVIL CASE Case No. 07-0437-CV-W-ODS

_____ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X **Decision by Court.** The issues have been considered and a decision has been rendered by the Court.

IT IS ORDERED AND ADJUDGED granting Defendants' Motion for Summary Judgment, denying Plaintiff's Motions for Relief, and finding all other motions are moot.

PATRICIA L. BRUNE,
Court Executive

DATE: 01/06/2009

/s/ Eva Will-Fees
Eva Will-Fees,
Courtroom Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

ROXANA WILSON, et al., Plaintiffs, vs. H&R BLOCK ENTERPRISES, INC., et al., Defendants.	Case No. 07-0437-CV-W-ODS
JOHN J. GRABNER, III, et al., Plaintiffs, vs. H&R BLOCK, INC., et al., Defendants.	Case No. 07-0599-CV-W-ODS

ORDER AND OPNION [sic] GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, DENYING PLAINTIFF'S MOTIONS FOR RELIEF, AND FINDING ALL, OTHER MOTIONS ARE MOOT

Pending are several motions, principally Defendants' Motion for Summary Judgment. The Court concludes Congress has lawfully and retroactively amended the statute that provided a cause of action, so the motion (Doc. # 68) is granted.

I. BACKGROUND

The Court has detailed the history of this case on numerous occasions. In the interests of completeness and comprehension it will do so again, focusing on the facts that are germane to the pending issues.

Plaintiff Roxana Wilson filed suit against Defendants on June 13, 2007, alleging violations of the Fair and Accurate Credit Transaction Act of 2003 ("FACTA"). The suit sought certification of a plaintiff class, and was assigned case number 07-0437-CV-W-ODS. Plaintiff John J. Grabner filed a similar suit on August 21, 2007; the case was assigned case number 07-0599-CV-W-DW. The latter case was transferred to the undersigned because of its similarity to Wilson's suit, and the case number changed to 07-0599-CV-W-ODS. On September 17, 2007, the Court consolidated the two cases and directed that all future filings be made in case number 07-0437, The consolidation was facilitated by the fact that Grabner's attorneys were also Wilson's attorneys.

Plaintiffs filed a Motion for Class Certification, and Defendants filed a Motion for Summary Judgment. The former motion has never been ruled, so no class actually exists.[1] The latter motion was predicated

---

[1] In light of the Court's ruling today, the Motion to Certify Class (Doc. # 50) is denied as moot. Defendants' Motion for Leave to File Citation to Supplemental Authority (Doc. # 65) is also moot, as this motion was effectively replaced by Defendants' Motion for Summary Judgment.

on changes to FACTA that were purportedly retroactive. On August 6, 2008 – after many extensions were granted to afford Plaintiffs time to consider the issues and their options – Wilson agreed to dismiss her claims. The attorneys then participated in a telephone conference with the Court, following which the Court granted Grabner's attorneys leave to withdraw. The Court also extended the deadline for Grabner to respond to the Motion for Summary Judgment in order to allow Grabner sufficient time to find a new attorney. Several more extensions were granted, but all have passed and the Motion for Summary Judgment is now ripe for consideration.

II. DISCUSSION

A moving party is entitled to summary judgment on a claim only if there is a showing that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See generally Williams v. City of St. Louis*, 783 F.2d 114, 115 (8th Cir. 1986). "[W]hile the materiality determination rests on the substantive law, it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *see also Get Away Club, Inc. v. Coleman*, 969 F.2d 664 (8th Cir. 1992). In applying this standard, the Court must view the evidence in the light most favorable to the non-moving party, giving that party the benefit of all inferences that may be reasonably drawn from the evidence. *Matsushita Elec. Indus. Co.*

v. Zenith Radio Corp., 475 U.S. 574, 588-89 (1986); *Tyler v. Harper*, 744 F.2d 653, 655 (8th Cir. 1984), *cert. denied*, 470 U.S. 1057 (1985). However, a party opposing a motion for summary judgment "may not rest upon the mere allegations or denials of the . . . pleadings, but . . . by affidavits or as otherwise provided in [Rule 56], must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

FACTA requires merchants accepting credit cards to truncate certain information on the receipt.

> Except as otherwise provided in this subsection, no person that accepts credit cards or debit cards for the transaction of business shall print more than the last 5 digits of the credit card number or the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction.

15 U.S.C. § 1681c(g)(1), FACTA incorporated already-existed enforcement mechanisms, including private lawsuits against those who willfully failed to comply with the law's requirements. The penalty for willful violations is between $100 and $1,000 per transaction; there is no cause of action for violations that are not willful. *Id.* § 1681n.

On June 3, 2008 – after these cases were consolidated – the President signed H.R. 2356 – the Credit and Debit Card Receipt Clarification Act of 2007 – into law, adding subsection (d) to section 1681n:

> For the purposes of this section, any person who printed an expiration date on any receipt provided to a consumer cardholder at a point of sale or transaction between December 4, 2004, and June 3, 2008, but otherwise complied with the requirements of section 1681c(g) of this title for such receipt shall not be in willful noncompliance with section 1681c(g) of this title by reason of printing such expiration date on the receipt.

Section 3(b) of H.R. 2356 expressed Congress' intent that the clarification operate retroactively, declaring that the amendment "shall apply to any action, other than an action which has become final, that is brought for a violation of [15 U.S.C. § 1681 c(g)] to which such amendment applies without regard to whether such action is brought before or after the date of the enactment of this [Credit and Debit Card Receipt Clarification Act of 2007]."

Grabner's claims arise from Defendants' failure to truncate the expiration date and not the failure to truncate his credit card number. This can be inferred from his allegations, Amended Complaint ¶¶ 52, and is established beyond contravention by examining his receipt — which shows the date has not been truncated but the credit card number (save the last four digits) has been truncated. The recent amendment thus purports to apply to this case. Grabner claims Defendants violated FACTA by printing the expiration date of his card, but Defendants otherwise complied with FACTA's requirements. His suit was not final when the amendment was signed into law.

Therefore, Grabner cannot establish willful non-compliance, and he has no cause of action.

Grabner's remaining arguments address the unfairness and unconstitutionality of the amendment. Fairness – separate and apart from constitutionality – is not a matter for courts to decide. As for the Constitution, Congress is empowered to amend laws even if the amendment will affect pending cases. *E.g.*, *Plaut v. Spendthrift Farm*, 514 U.S. 211, 218 (1995). Grabner does not have a Due Process interest sufficient to overcome Congress' power to regulate economic and business affairs. *Lundeen v. Canadian Pacific R. Co.*, 532 F.3d 682, 689-90 (8th Cir. 2008). Congress acted with a rational purpose – it was concerned about the burdens associated with non-compliance, which it viewed as disproportionate to the failure to truncate the expiration date. Because Congress did not act arbitrarily and capriciously, the retroactive "clarification" of the term "willful" is valid and bars Grabner's suit.[2]

---

[2] His motion to apply the Fifth Amendment (Doc. # 92) – which raises these issues as a part of a request for affirmative relief – is denied.

III. CONCLUSION

For these reasons, summary judgment is entered against Plaintiff John Grabner and in favor of Defendants.

IT IS SO ORDERED.

/s/ Ortrie D. Smith
ORTRIE D. SMITH, JUDGE
UNITED STATES DISTRICT COURT

DATE: January 6, 2009

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

ROXANA WILSON, et al., Plaintiffs, vs. H&R BLOCK ENTERPRISES, INC. et al., Defendants.	)	Case No. 07-0437-CV-W-ODS
JOHN J. GRABNER, III, et al., Plaintiffs, vs. H&R Block, Inc., et al., Defendants.	)	Case No. 07-0599-CV-W-ODS

ORDER (1) DENYING MOTIONS TO STRIKE OR IGNORE, (2) DENYING MOTION TO VACATE AND REMAND, AND (3) ESTABLISHING DEADLINE FOR DEFENDANTS TO FILE REPLY SUGGESTIONS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Plaintiff Roxana Wilson filed suit against Defendants on June 13, 2007, alleging violations of the Fair and Accurate Credit Transaction Act of 2003 ("FACTA"). The suit sought certification of a plaintiff

class, and was assigned case number 07-0437-CV-W-ODS. Plaintiff John J. Grabner filed a similar suit on August 21, 2007; the case was assigned case number 07-0599-CV-W-DW. The latter case was transferred to the undersigned because of its similarity to Wilson's suit, and the case number changed to 07-0599-CV-W-ODS. On September 17, 2007, the Court consolidated the two cases and directed that all future filings be made in case number 07-0437. The consolidation was facilitated by the fact that Grabner's attorneys were also Wilson's attorneys.

Plaintiffs filed a Motion for Class Certification, and Defendants filed a Motion for Summary Judgment. The former motion has not been fully briefed and has not been ruled. The latter motion was predicated on changes to FACTA that were purportedly retroactive. On August 6, 2008 – after many extensions were granted to afford Plaintiffs time to consider the issues and their options – Wilson dismissed her claims. The attorneys then participated in a telephone conference with the Court, following which the Court granted Grabner's attorneys leave to withdraw. The Court also extended the deadline for Grabner to respond to the Motion for Summary Judgment in order to allow Grabner sufficient time to find a new attorney.

On September 25, Grabner (acting pro se) filed a Motion to Vacate and Remand, asking the Court to vacate the Order allowing his attorneys to withdraw and to remand the case to the United States District Court fo [sic] the Western District of Pennsylvania.

Grabner's attorney sent the Court a letter detailing the efforts they made to help Grabner obtain new representation. Defendants also filed a response to Grabner's motion. On October 15, Grabner filed motions asking the Court to strike or ignore these submissions. All of these materials (except the letter) were filed in case number 07-0437. In addition, on October 15 Grabner filed two documents that purportedly respond to Defendants' Motion for Summary Judgment. These documents were filed in case number 07-0599.

The Motion to Vacate Order and Remand (Doc. # 83) is denied. Addressing the latter issue first, it is significant that this case was originally filed in this Court. A case that is removed to federal court from state court can be remanded back to state court, but this case cannot be remanded because it did not originate in state court. At best, the case could be transferred to the Western District of Pennsylvania, but Grabner initially chose this forum and has not offered any reason under 28 U.S.C. § 1404 to justify a transfer.

Before addressing the first aspect of Grabner's motion, the Court must consider his request that the Court strike or ignore the materials submitted by Defendants and Grabner's attorneys. The motions (Doc. # 85 and Doc. # 86) are denied. With respect to the letter, the Court indicated a desire to be informed as to the efforts made to arrange for substitute counsel, so the letter is proper. As to Defendants' input, the Court is aware Grabner's representation

does not affect Defendants and they have no real interest in how the Court resolves the matter. However, Grabner's request that the case be remanded or transferred does affect Defendants, and their response is proper.

With respect to the Order allowing Grabner's attorneys to withdraw, Grabner correctly observes that such leave is rarely granted. Local Rule 83.5(0) states as follows:

> Counsel may not be relieved from further representation of a client without obtaining leave of Court, Such leave will ordinarily be denied unless appearance by substitute counsel is assured or has occurred.

Substitute counsel was not assured and had not (and has not) occurred. Nonetheless, the Local Rule does not absolutely prohibit an attorney from being relieved so the Court's Order does not violate the Rule.

Grabner contends he is prejudiced by not having legal representation. Grabner has no right to representation, and any representation that he obtains is the product of a contractual agreement between himself and one or more attorneys. An agreement to represent a client does not bind an attorney such that the attorney becomes an indentured servant. Ethical considerations may come into play, and Grabner may have causes of action he can assert against his attorneys – but these are matters beyond this proceeding's purview. The Court has taken steps

to protect Grabner's position in this case by directing his former attorneys provide information to Grabner that would help him locate new attorneys, The Court also extended the deadline for responding to Defendants' Motion for Summary Judgment. If Grabner had retained new counsel, the new attorney(s) would undoubtedly have requested more time, which the Court would have granted. Grabner's inability (or unwillingness) to find new attorneys does not justify forcing his former attorneys to continue representing him against their will.

Grabner has responded to the Motion for Summary Judgment. While the responses have been filed in case number 07-0599, the Court will accept them and treat them as proper responses. Defendants shall have until and including November 3, 2008, to file Reply Suggestions if they desire to do so.

The parties are reminded that all future filings should be made in case number 07-0437.

IT IS SO ORDERED.

/s/ Ortrie D. Smith
ORTRIE D. SMITH, JUDGE
UNITED STATES DISTRICT COURT

DATE: October 16, 2008

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 09-1524

Roxana Wilson

John J. Grabner, III

Appellant

Wilson, Roxanna & Grabner, John J., III

v.

H&R Block Enterprises, Inc., et al.

Appellees

Appeal from U.S. District Court for the
Western District of Missouri – Kansas City
(4:07-cv-00437-ODS)

ORDER

The petition for rehearing en banc is denied, The petition for rehearing by the panel is also denied.

May 19, 2010

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

H.R. 4008

One Hundred Tenth Congress
of the United States of America

AT THE SECOND SESSION

Begun and held at the City of Washington on Thursday, the third day of January, two thousand and eight

An Act

To amend the Fair Credit Reporting Act to make technical corrections to the definition of willful noncompliance with respect to violations involving the printing of an expiration date on certain credit and debit card receipts before the date of the enactment of this Act,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the 'Credit and Debit Card Receipt Clarification Act of 2007'.

SEC. 2. FINDINGS; PURPOSE.

(a) Findings – The Congress finds as follows:

(1) The Fair and Accurate Credit Transactions Act (commonly referred to as 'FACTA') was enacted into law in 2003 and 1 of the purposes of such Act is to prevent criminals from obtaining access to consumers' private

financial and credit information in order to reduce identity theft and credit card fraud.

(2) As part of that law, the Congress enacted a requirement, through an amendment to the Fair Credit Reporting Act, that no person that accepts credit cards or debit cards for the transaction of business shall print more than the last 5 digits of the card number or the expiration date upon any receipt provided to the card holder at the point of the sale or transaction.

(3) Many merchants understood that this requirement would be satisfied by truncating the account number down to the last 5 digits based in part on the language of the provision as well as the publicity in the aftermath of the passage of the law.

(4) Almost immediately after the deadline for compliance passed, hundreds of lawsuits were filed alleging that the failure to remove the expiration date was a willful violation of the Fair Credit Reporting Act even where the account number was properly truncated.

(5) None of these lawsuits contained an allegation of harm to any consumer's identity.

(6) Experts in the field agree that proper truncation of the card number, by itself as required by the amendment made by the Fair and Accurate Credit Transactions Act, regardless of the inclusion of the expiration date, prevents a potential fraudster from

perpetrating identity theft or credit card fraud.

(7) Despite repeatedly being denied class certification, the continued appealing and filing of these lawsuits represents a significant burden on the hundreds of companies that have been sued and could well raise prices to consumers without corresponding consumer protection benefit.

(b) Purpose – The purpose of this Act is to ensure that consumers suffering from any actual harm to their credit or identity are protected while simultaneously limiting abusive lawsuits that do not protect consumers but only result in increased cost to business and potentially increased prices to consumers.

SEC. 3. CLARIFICATION OF WILLFUL NONCOMPLIANCE FOR ACTIONS BEFORE THE DATE OF THE ENACTMENT OF THIS ACT.

(a) In General – Section 616 of the Fair Credit Reporting Act (15 U.S.C. 1681n) is amended by adding at the end the following new subsection:

'(d) Clarification of Willful Noncompliance – For the purposes of this section, any person who printed an expiration date on any receipt provided to a consumer cardholder at a point of sale or transaction between December 4, 2004, and the date of the enactment of this subsection but otherwise complied with the requirements of section 605(g) for such receipt shall not be in willful

noncompliance with section 605(g) by reason of printing such expiration date on the receipt.'.

(b) Scope of Application – The amendment made by subsection (a) shall apply to any action, other than an action which has become final, that is brought for a violation of 605(g) of the Fair Credit Reporting Act to which such amendment applies without regard to whether such action is brought before or after the date of the enactment of this Act.

Speaker of the House of Representatives.

Vice President of the United States and

President of the Senate.

END

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

ROXANA WILSON, et al., Plaintiffs, Vs. H&R BLOCK ENTERPRISES, INC., Et al., Defendants.	)	Case No. 07-0437-CV-W-ODS
JOHN J. GRABNER, III, et al., Plaintiffs, Vs. H&R BLOCK, INC., et al., Defendants.	)	Case No. 07-0599-CV-W-ODS

PROBLEM SOLVING SUGGESTION

I have been able to secure Pittsburgh Counsel who is not admitted in The Federal or State Courts in Missouri and does not know any Missouri admitted Lawyers and is not willing to practice in Missouri.

Council has agreed to participate in the Federal Court at Pittsburgh if this case is transferred to The United States District Court for The Western District of Pennsylvania.

I Respectfully Suggest that this will solve all problems, promote justice and Court Efficiency and protect my 28 USC 1654 Absolute Right to Counsel and will not prejudice Defendants and will make an Appeal to the 8th Circuit Court of Appeals unnecessary. It will also permit me to enforce my original retention agreement with the Yates and Schiffrin Lawfirms. Please notice that the transfer request was retained in Document no. 83.

Respectfully

/s/ John J. Grabner III

John J. Grabner III

12-28-08
PG. 1 of 2

YOUR HONOR,

PLEASE LET ME EXPLAIN WHY I AM TRYING TO PRESERVE A CASE WHICH I BELIEVE WAS VALID WHEN FILED AND STILL RETAINS MERIT.

MY GRANDFATHER WAS A LOCOMOTIVE ENGINEER, MY FATHER John J. GRABNER JR. WAS A LOCOMOTIVE ELECTRICIAN, MY BROTHER-IN LAW DENNIS VAUGHAN A RAILROAD CONDUCTOR AND MY UNCLE JOHN HODGSON WORKED THE RAILROAD BRIDGES & SIGNALS DEPARTMENT.

MY LAWYERS WERE QUICK TO CLIMB ON BOARD WHEN THEY THOUGHT THEY COULD EARN AN EASY FEE, SO I CONTEND THEY SHOULD NOT BE PERMITTED TO JUMP OFF JUST BECAUSE THE JUNE 2008 *FACTA* AMENDMENT MADE IT MORE DIFFICULT. THEY WERE NOT "INDENTURED SERVENTS" BUT SOPHISTICATED BUSINESS MEN WHOSE SUNNY EXPECTATIONS BECAME CLOUDY BUT NOT ENTIRELY LOST. I RESPECTFULLY SUGGEST THEY COULD HAVE DONE THE SAME RESEARCH AND ADVANCED THE SAME OR BETTER ARGUMENTS PRESENTED BY ME AND THAT THE ETHICAL RULES OF THEIR PROFESSION REQUIRED THEM TO DO SO.

I AM A RETIRED LOCOMOTIVE ENGINEER WHO WAS BORN INTO A RAILROAD FAMILY AND RAISED IN A RAILROAD COMMUNITY WHICH PREACH THE TALK AND WALKED THE TAKING RESPONSIBILITY.

I TAKE MY OBLIGATIONS AS PLAINTIFF AND CLASS REPRESENTATIVE SERIOUSLY. I COULD NO MORE TAKE THE DOG AND DESENT THIS CASE AND THE CLASS, JUST BECAUSE THIS CASE HAS BECOME DIFFICULT THAN I COULD JUMP-OFF A TRAIN WHOSE BRAKES HAVE FAILED AND WAS HEADING TOWARDS A *TEMPORARILY* WASHED OUT TRACK ON A BRIDGE.

PLEASE FORGIVE ME FOR DOING WHAT I, IN GOOD FAITH, BELIEVE IS JUSTIFIED AND MERITORIOUS.

RESPECTFULLY,

/s/ John J. Grabner III
JOHN J. GRABNER III

LAW OFFICE OF
ALFRED G. YATES JR, P.C.

519 ALLEGHENY BUILDING
429 FORBES AVENUE
PITTSBURGH, PA 15219
TOLL FREE: 1(800) 391-5164
TELEPHONE: (412) 391-5164
FACSIMILE: (412) 471-1033
email: yateslaw@aol.com

May 25, 2007

Mr. John S. Grabner, III
P.O. Box 24
Beaver, PA 15009-0024

Re: H&R Block FACTA Case

Dear Mr. Grabner:

By your signature below, you are acknowledging that you have agreed to be represented by Law Office of Alfred G. Yates Jr., P.C., Schiffrin Barroway Topaz & Kessler, LLP and such co-counsel as they deem appropriate to associate with in the above-referenced action against **H&R Block**.

We have advised you that we have conducted a thorough investigation into the facts and circumstances surrounding the allegations contained in the Complaint, and we believe them to be meritorious. You understand that in seeking to be a class representative, you are undertaking certain fiduciary duties and responsibilities, which require you to adequately and fairly represent the class by becoming generally familiar with this litigation so that you may

monitor, review and participate with counsel in the prosecution of the action. You may and should confer with us at any time you feel it is appropriate to do so. Your fiduciary duty also requires you to act in the best interests of the class at all times and not put your own personal interests ahead of the interests of the class. Also, please let us know if your contact information changes.

Our firm prosecutes class actions and is seeking to undertake this litigation on a contingent fee basis. This means we will not seek payment of any fees unless the lawsuit generates a recovery or benefit for the class. The payment of our fees in this suit is subject to court approval, and we generally seek to have our fees calculated as a percentage of the full amount of the funds recovered, i.e., as a percentage of the amount recovered before the deduction of our fees and expenses. In no event, will we request over 33.33% of the amount recovered plus reasonable disbursements. If non-monetary benefits are achieved, we will base our fee request on prior Court awards where similar benefits were achieved. If there is no recovery or benefit for the class, our firms will not be paid.

We will advance all costs and expenses that we deem necessary to pursue an appropriate recovery in this suit. Typical costs and expenses include but are not limited to telephone, copy, and postage expenses, as well as more substantial items, such as the cost of travel, deposition, trial, and expert witness and consultant fees. If the lawsuit generates a recovery for the class, we will apply to the Court to have our costs

and expenses reimbursed from the settlement fund remaining after the attorneys' fees have been paid. If there is no recovery, you will not be responsible for any costs,

In the course of the lawsuit, we may, without notice to you, retain and/or work with other law firms, in which case, we would divide any legal fees we receive with such other firms. You agree that we may divide fees with other attorneys for serving as local counsel, of counsel, co-counsel, or for referral fees, or other services performed. The division of attorneys' fees with other counsel may be determined upon a percentage basis or upon time spent in assisting the prosecution of the action. The division of fees with other counsel is our sole responsibility and will not increase the fees described above. If we determine at any time that the prosecution of these claims is not feasible or is contrary to justice or the standards of good faith, we are then entitled to withdraw from the representation in the action, with reasonable notice to you. This agreement shall be governed by the laws of the Commonwealth of Pennsylvania, All disputes, disagreements and claims arising out of or related to this agreement shall be resolved exclusively through binding arbitration pursuant to the Rules of the American Arbitration Association. We look forward to working with you.

Very truly yours,

LAW OFFICE OF ALFRED G. YATES JR., P.C.

By: /s/ Alfred G.Yates, Jr.
Alfred G.Yates, Jr.

/s/ John J Grabner III
John J. Grabner III

H&R BLOCK INC FACTA LITIGATION

Confidential Attorney – Client Communication
Privileged Attorney Work Product

NAMED PLAINTIFF INFORMATION LETTER

To assist you in understanding class action litigation, we briefly set forth below a description of the process. Please contact us at any time to further clarify any of these points or if you have any questions whatsoever.

1. **Class Representation.** Named plaintiffs represent the interests of all class members who have been affected by the challenged conduct. In this case the interests of consumers whose credit/debit card receipts were unlawfully printed with more than the last five digits of the card number and/or the expiration date by H&R Block Inc are being represented.

2. **Duty as a Class Representative.** The Court requires the class representatives to adequately and fairly represent the class. This is the class representative's duty. Here is how it is accomplished:

a. *You shall be generally familiar with the litigation.*

(1) This does not mean you must know every aspect of this litigation. We will keep you informed of major events and this will satisfy your duty. You should read the complaint and understand it generally. You should know who

the parties are. You should know why you are suing.

(2) You may and should confer with us at any time you feel it is appropriate to do so.

b. *You shall vigorously prosecute the litigation.*

This basically means you will authorize your attorneys to do what is necessary to successfully prosecute this case on behalf of the class. You have done so and we are vigorously pursuing this case.

c. *You shall hire lawyers experienced in class action litigation.*

Your lawyers have national experience in class actions. Plaintiffs' lawyers have participated in numerous consumer, antitrust and securities cases, with aggregate recoveries in the hundreds of millions of dollars.

3. **Responsibility for Costs.** Costs are such items as filing fees, photocopies, transcript costs, and the cost of notices if necessary. All costs are being advanced by your counsel. Typically the costs are paid (pursuant to an order of the presiding judge) from the amounts recovered from the defendants.

4. **Notice to the Class.** The class representatives are responsible for providing notice to the class, depending on whether the federal rules or the judge requires such notice. We will undertake this task on behalf of the class and be responsible for all costs. Notice is usually accomplished by mailing a

copy to identifiable class members and publishing a copy in newspapers.

5. **No Special Treatment.** You have not been promised any special treatment above the treatment which may be awarded to other class members. If successful, we will probably ask the judge to award you additional compensation for the extra time and effort you expend as a class representative and for having the courage to challenge defendants' conduct. We cannot guarantee the judge will do so.

6. **You Do Not Have a Duty to Investigate or to Be an Expert.** You have no duty to personally investigate the allegations of the complaint – this is why you have hired experienced lawyers. We have conducted a thorough investigation and you have fulfilled your duty by relying on us to do so. We will and have discussed with you our investigation. Nonetheless, it is a good practice for you to familiarize yourself with the allegations in the Complaint, to keep a file on this matter, to read our reports to you, and to stay generally abreast of developments.

7. **Attorneys' Fees.** Our fees must be approved by the Court and are dependent upon a recovery. Typically, this is on a percentage of recovery. Usually we will request the court to award plaintiffs' attorneys a percentage of the recovery plus our out-of-pocket expenses. You will be provided with notice of our fee request and you will have the opportunity to discuss it with us and object to our request if you

choose to do so. No matter the outcome, you will not be obligated for any of our attorneys' fees.

8. **Settlement.** If this case settles and does not go the trial, the settlement must be approved by the Court. You are entitled to object to the settlement if you do not agree with our recommendation to settle. We will consult you before recommending a settlement.

9. **Judicial Approval.** In prosecuting a class action, all of our actions are subject to judicial approval and courts take that approval seriously. Thus, we are subject to scrutiny that other lawyers, including defendants' counsel, never receive. This should provide you comfort that our actions will be of the highest professional caliber.

10. **Attorneys.** Your counsel in this matter are experienced in this field. Among the counsel are:

Alfred G. Yates Jr, Esq.
Law Office of Alfred G. Yates Jr, PC
519 Allegheny Building
429 Forbes Avenue
Pittsburgh PA 15219
412-391-5164 or 800-391-5164
Fax: 412-471-1033
email: yateslaw@aol.com

Joseph A. Weeden, Esquire
Schiffrin Barroway Topaz & Kessler, LLP
280 King of Prussia Road
Radnor PA 19087
610-667-7706 (ph)
610-667-7056 (fax)
email: jweeden@sbtklaw.com

You may contact us at any time and we will be in contact with you to advise you of the progress of the litigation.

P. O. Box 24
Beaver, PA 15009-0024
724-462-7757
August 9, 2008

Alfred G. Yates, Jr., PC
Law Office
519 Allegheny Building
429 Forbes Avenue
Pittsburgh, PA 15219-1622
VIA FACSIMILE 412-471-1033

RE: Response

Dear Al,

1. When you solicited me as Plaintiff and as which became 07-0437, I agreed to be your client, because I believed you were a First Class competent lawyer, skilled in Class Action Litigation who would zealously represent me and the proposed "Class".

2. My view of your obvious skill has not changed. I respectfully ask you to devote your skills, learning and efforts to processing this case instead of trying to abandon me; the proposed "Class" and the case for what I contend are invalid reasons.

3. I suggest you cannot sustain by Fact the ¶3 conclusion in your recent motion, claiming that our relationship is irretrievable "sic" broken.

4. I object to the proposed August 11, 2008 at 2 P.M. CST conference call and ask you to cancel it.

5. I Object to the August 6; 2008 letter correspondence with Judge Smith and contend that if you want to withdraw, the exclusive vehicle is a

formal local rule 83.5(0) motion which I will oppose and who's words advise (such leave will ordinarily be denied unless entry of appearance by substitute counsel is assured or has occurred). You must know that I cannot obtain substitute counsel especially one with your acknowledged skills.

6. I contend that everything that you or Shiffrin lawyers intend to present to Judge Smith be written and signed under the Federal Rule of Civil Procedures Rule 11 and the Code of Professional Conduct.

7. The Roxanna Wilson "Stipulation of dismissal" has no impact without a Court Order. See: FRCP 23(E) and (E)(5) in addition FRCP 23(G) involving case counsel.

8. All pleading's in the case demands "equitable relief" to terminate defendant's conduct plus (other relief). Thus, even if the punitive and no fault claims have been eliminated by recent legislation, this case is still viable. Please refer to

    A) Complaint filed in Western District of Pennsylvania "Prayer for relief" 1(F) and (G)

    B) Amended Consolidated Class Action Complaint filed in Kansas City, Missouri on November 19, 2007. "Prayer for relief" (F) and (G)

    C) Corrected Complaint filed December 5, 2007 in Kansas City, Missouri, "Prayer for relief" (F) and (G)

9. Defendant's motion for summary judgment does not rely on January 3, 2008 amendment by Congress. I ask that you research whether the retroactive feature vacate vested rights is Constitutional/or under Federal and/or State Law.

10. In regard to the summary judgment motion, I suggest that you plead "alter ego" apparent authority and move to "pierce the corporate veil" and request time to do so permitted by FRCP 56(E) and (F).

11. I suggest the Court – not you – should decide if this case has continued vitality and only after previous briefing and oral argument.

12. If you proceed on the conference call, please give copy of this letter to Judge Smith and tell him, I respectfully oppose oral or letter disposition of any element of this case.

13 The above is not everything I contend, but I believe it sufficient at the present time.

Hoping we can continue in harmony and assure you of my continuing respect for your skills and support.

Thank you!

Very truly yours,

/s/ John J. Grabner III
John J. Grabner III

JJG:lc
Copy #2